

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY
AT MUSOMA**

PC CIVIL APPEAL NO 15 OF 2020

JOFREY JONATHANI AMBOGO..... APPELLANT

VERSUS

ANDREW NYITAMBE RYAGA..... RESPONDENT
*(Originating from Civil Appeal No. 31 of 2019 in the District Court of Tarime, Original civil case
113/2019 of the Primary court of Tarime district at Shirati)*

JUDGMENT

18th August & 21st September, 2020

Kahyoza, J

A person may litigate when he is convinced that his right has been infringed, he has evidence to prove the transgression and he stands to benefit therefrom. It is not in the interest of any one, not even the court, to litigate for the sake of showing off or taking unfair advantage over the adverse party. **Jofrey Jonathani Ambogo** (Jofrey) sued **Andrew Nyitambe Ryaga** (Andrew) before the primary court claiming Tzs. 285,000/= being the value cassava destroyed by the latter's sheep. The primary court found in favour of **Jofrey** and awarded him the claimed amount of Tzs. 285,000/=.

Aggrieved, **Andrew** appealed to the district court, which decided that there was no evidence to establish the appellant's claim. It upheld the appeal and dismissed the appellant's claim.

Dissatisfied the appellant, the farm owner, has appealed to this Court contending the district court did not consider the evidence on the record. On his part, the respondent contended that there was no evidence to establish that the appellant's crops were destroyed to the extent claimed.

There are two issues for determination-

1. Whether the respondent's sheep destroyed the appellant's cassava farm as was alleged or at all.
2. To what extent was the appellant's farm damaged?

Jofrey found a sheep in his cassava. It destroyed his cassava. He did not know the owner of the sheep. He took the sheep to the village executive office where it is kept at cost to be paid by one of the parties. and lodged complaint. Later, he instituted a claim to the primary court claiming Tzs. 285,000/=, being the value of his cassava **Andrew's** sheep destroyed. The primary court awarded the claim. **Andrew** appealed to the district court. The district court ruled out that **Jofrey** nosedived to establish his claim to the required standard. It quashed the decision of the primary court, dismissed the claim in its entirety and ordered the sheep to be returned to **Andrew**.

Dissatisfied with the decision of the district court, **Jofrey** has appealed to this Court contending that the district court erred to dismiss his claim. He submitted that **Andrew's** sheep destroyed his cassava and he tendered evidence to prove his claim. In his reply, **Andrew** the respondent, supported the findings of the district court that there was no evidence to prove the claim. He averred that one sheep cannot destroy

cassava worthy Tzs. 285,000/- or three acres of cassava. **Andrew** submitted that the appellant took his sheep and that he requested the sheep to be returned to him before the primary court but it was not returned.

Did Andrew's sheep destroy the Jofrey's cassava?

This is second appeal. There is an established wise rule of practice prohibiting a second appellate court to disturb concurrent findings of facts two lower courts unless it is clearly shown that there has been a misapprehension of evidence, a miscarriage of justice or violation of some principle of law or procedure. (See **Amratlal Damodar Maltaser and Another t/a Zanzibar Silk Stores Vs. A.H Jariwalla t/a Zanzibar Hotel** [1980] T.L.R 31). This Court will review the evidence of the trial court as there are no concurrent findings of fact in the instant case, by the two courts below.

The evidence on record shows that **Jofrey** explained how he found a sheep in his cassava farm. The sheep destroyed his cassava. He tendered a valuation report to establish the value of the destroyed cassava. The agricultural extension officer prepared by valuation report. Dismissing the claim the district court contended that the agricultural extension officer failed to state how he arrived at the value of the destroyed cassava. The district court held further that **Jofrey** did not explain how one sheep destroyed cassava valuing Tzs. 285,000/-.

I concur with the district court's finding that there was no convincing evidence to establish that the value of the destroyed cassava

was Tzs. 285,000/-. However, I do not share the views that **Andrew's** sheep did not destroy **Jofrey's** cassava. There is evidence that **Jofrey's** cassava was damaged though there was no evidence prove the extent of the damage. The extent of the damage was exaggerated. **Jofrey** planned to making a fortune out of the misery instead of looking for a dress.

It is our cherished principle of law that generally in civil cases, the burden of proof lies on the party who alleges anything in his favour. See the case of **Antho M. Masaga Vs Penina (Mama Mgesi) and Lucia (Mama Anna)** Civil Appeal No. 118 of 2014 CAT (Unreported) and **Sections 110 and 111 of the law of Evidence Act, [Cap. R.E. 2002]**. Thus, **Jofrey**, the claimant was required under the law to provide evidence in support of the claim and to give facts upon which the damages could be assessed. Simply put, before the assessment of damages could be made, the **Jofrey**, the claimant must first furnish evidence to warrant the award of damages. He must also provide facts that would form the basis of assessment of the damages he would be entitled to.

To what extent was the appellant's farm damaged?

I find that **Jofrey**, the claimant furnished evidence to warrant the award of damages. There is evidence by balance of preponderance that **Andrew's** sheep destroyed his cassava. **Jofrey** fell flat to provide facts that would form the basis of assessing the damages he would be entitled to. There was no evidence on how he arrived at the claimed amount of Tzs. 285,000/= . The evidence of the agricultural extension officer was not better than a guess work at its best. It was wrong to dismiss **Jofrey's**

claim in total. **Jofrey** established a tort of trespass and failed to establish the extent of the damage. The district court ought to have awarded him a nominal damage. In **Neville V. London Express Newspaper Ltd [1919] A.C. 368 @ p. 392**, per Viscount Haldane – H.L. it was stated that-

*" According to Street on Torts, the function of **nominal damages is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that infringement of it is a tort actionable per se.** [Street on Torts 5th Edition London Butterworth]. This means that nominal damages are normally awarded in all torts that are actionable per se; e.g. **damages for trespass to land;** actions founded on defamation, i.e. damages for libel and slander; damages for assault; damages for nuisance; damages for false imprisonment; damages for seduction; etc. and again in actions for breach of contract. However, the damages that are awarded in these cases are said to be '**at large**'. What this means is that although the interest protected may not have a precise cash value, the court is free on proof of the commission of the tort, or the breach of contract, to award 'substantial' damages instead of 'nominal' damages."*

I find that **Jofrey** was entitled to nominal damages of Tzs. 190,000/= for trespass to his cassava farm causing damage.

The district court ordered **Andrew's** sheep to be returned to him. **Andrew** was duty bound to redress **Jofrey** for the trespass and damage caused to his farm. **Andrew** had also a right to be given back his sheep. There is evidence on the record that the sheep was kept at the third person's place as directed by the ward executive officer. At the hearing of

the appeal, the appellant informed this court that the costs of keeping the sheep rose up to Tzs. 182,000/= calculated at the cost of Tzs. 500/= a day or Tzs. 712,000/= calculated at the rate of 1,000/=. I find the cost of keeping one sheep at Tzs. 500/= a day reasonable. **Jofrey** was bound to pay for the costs of keeping the sheep at the third party's place. He took the sheep to that place, he did not heed to the order of the court to return the sheep to the Andrew. He kept the goat at the third party's place at his own peril.

It is an established principal of tort that damages awarded are subject to the rule that the innocent party must take reasonable steps to mitigate losses. See the Ghanaian case of **BOHAM v. EVONNA [1992] 1GLR 287 @ 288**, where the court held that-

"where an income earning vehicle damaged in a motor accident was capable of being repaired, the plaintiff had a duty to minimize his loss and should not wait until the date of judgment, which might be long in coming..."

Much as there is no evidence as to the value of the sheep at the time it was bestowed to the third party, it was not above Tzs. 50,000/=. The costs of keeping it at the third party's place has escalated to Tzs. 182,000/= and the respondent claiming that the costs might be Tzs. 712,000/=. That is why I pointed at the beginning of this judgment that cases should not be instituted to punish the adverse party but to seek to redress the damage or loss and even in that case parties should mitigate loses.

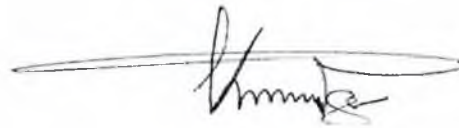
That said and done, I find **Jofrey** entitled to nominal damages of Tzs. 190,000/= and **Andrew** is eligible to repossess his sheep.

Consequently, I order **Jofrey** to pay costs of keeping the sheep of Tzs. 195,000/= to the person keeping the sheep and **Andrew** to pay damages of Tzs. 190,000/= to **Jofrey**.

Now, that the nominal damages awarded to **Jofrey** is almost equivalent to the costs of keeping the sheep, Andrew will pay the costs of keeping the sheep of Tzs. 195,000/= at cost of Tzs. 500/= a day to the custodian of the sheep and take his sheep instead of paying damages to **Jofrey**. Should **Andrew** fail to pay the costs of keeping the sheep within 30 days from the day of this judgment, the sheep shall be the property of the third person who kept the sheep in lieu of the costs.

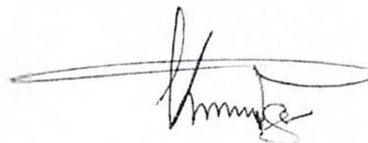
No order as to costs given the nature of this case.

I order accordingly.



J.R. Kahyoza
JUDGE
21/9/2020

Court: Judgment delivered in the presence of the parties. Right of appeal after obtaining a certificate that a point of law involved in the intended appeal from this Court. B/C Tenga present.



J. R. Kahyoza
JUDGE
21/9/2020

